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PFAS Rule Risks Vulnerability If High Court Trims Agency Power

David Edelstein
Archer & Greiner

Charles Dennen
Archer & Greiner

Archer & Greiner's David Edelstein and Charles Dennen write about the complications for companies subject to the EPA's new PFAS reporting rules—both in terms of scope and an uncertain legal landscape.

The Environmental Protection Agency's new rule under the Toxic Substances Control Act, or TSCA, could broadly expand the companies required to make disclosures about the manufacture and import of any per- and polyfluoroalkyl substances. But the rule could face significant legal challenges if the Supreme Court pulls back on agency authority next year as many expect.

The new rule goes into effect Nov. 13 and requires all manufacturers (including importers) of PFAS and PFAS-containing products since Jan. 1, 2011, to report expansively on their use of the products, including the molecular structure of each PFAS, the health and environmental effects, and the number of people exposed to the chemical, as well as for how long.

Companies that manufactured or imported PFAS in any year since 2011 have 18 months from the final rule's effective date to comply with the reporting requirements. Small entities whose reporting obligations are exclusively the result of importing products containing PFAS have 24 months to compl y.

PFAS' broad definition under the rule may significantly increase who is considered a manufacturer or importer, and thus who has a reporting obligation. In total, the EPA has determined that at least 1,462 PFAS that are known to have been made or used in the US since 2011 are covered.

Most manufacturers and importers of products containing any amount of any PFAS will have a reporting obligation—the rule doesn't contain exceptions for things like PFAS byproducts, PFAS impurities in a product, or de minimis volumes of PFAS. Consequently, companies that aren't familiar with TSCA and haven't had any reporting or record-keeping obligations specific to PFAS may now be subject to the rule.

The rule's look-back period may also pose significant challenges. As interpreted by the EPA, the regulation applies to any entity that has manufactured or imported any product that contained PFAS at any time, from the start of 2011 through the end of 2022.

This look-back requirement presents complications because the beginning of the reporting period predates the regulation of most PFAS. Although the EPA began regulating PFAS in 2002, that regulation focused on a few specific compounds, such as perfluorooctane sulfonic acid and perfluorooctanoic acid. The EPA issued a drinking water health advisory for PFOS and PFOA in 2016; the regulation of only a few other PFAS compounds came later.

Yet, the new rule identifies at least 1,462 PFAS that are known to have been made or used in the US since 2011. As a result, companies must pore over potentially decade-old documents and other records to evaluate the potential use of PFAS to determine whether they have a reporting obligation.

This new rule could also be complicated by the Supreme Court's impending review of the *Chevron* doctrine. There are two cases before the court that may result in the repeal of the doctrine, which is an administrative law principle that gives deference to a federal agency's interpretation of statutes and other administrative actions so long as the interpretation or agency action is reasonable.

If the court further pulls back or nullifies the doctrine as many court watchers expect, there is likely to be a significant uptick in challenges to agency action. The EPA's application of the new rule may be ripe for challenge.

For example, the EPA's interpretation of the rule appears to be an expansion on the plain language of Section 705.10, which only applies to "persons who have manufactured for commercial purposes a chemical substance" that meets the regulatory definition of PFAS. On its face, it doesn't apply to manufacturers of products that may contain trace amounts of PFAS.

The EPA's interpretation of the rule also serves as an expansion of TSCA, which generally exempts small manufacturers from its requirements. These and other EPA applications of the new rule may be challenged if the Supreme Court rules the way many court watchers expect.

Compliance will be expensive, time-consuming, and will pose challenges to the regulated community. Companies should begin the process now to determine whether and/or to what extent reporting is required.

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Author Information

David Edelstein and Charles Dennen are partners in the environmental law group with Archer & Greiner in New Jersey.